No. 3015.

# United States

# Circuit Court of Appeals,

## FOR THE NINTH CIRCUIT.

Charles K. Holsman and
Gideon M. Freeman,
*Plaintiffs in Error,*
*vs.*
United States of America,
*Defendant in Error.*

**Petition of Gideon M. Freeman, Plaintiff in Error, for a Rehearing.**

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**Petition of Gideon M. Freeman, Plaintiff in Error, for a Rehearing.**

Gideon M. Freeman respectfully presents this, his petition for a rehearing of the above-entitled matter, upon the facts and grounds hereinafter stated:

I.

### The Demurrer of the Appellants to the Indictment Against Them Should Have Been Sustained.

The indictment in no way alleges fraudulent intent on the part of the defendants in doing that with which they are charged.

The opinion handed down herein correctly states the law applicable in this case when it says "where the facts alleged necessarily import willfulness, the failure to use the word itself is not fatal." (Van Gesner v. United States, 153 Fed. 46.) However, in this case the facts alleged *do not* necessarily import willfulness. There must either be a *positive* allegation of intent, or the facts alleged must *necessarily* import such willfulness. The only allegation of intent in this case is *negative,* not *positive.* (Brief of appellee, page 10, lines 2 to 16, inclusive, quoting from indictment.) Exclusive of the Van Gesner case, which we respectfully submit supports our contention, the only case advanced by the Government is that of Hughes v. United States, 231 Fed. 50, which is not identical with the case at bar. There the defendants were charged with fraudulently *soliciting* and *receiving* money; here they are charged with *conspiracy.* The court here says (opinion, page 3), "and this with the ultimate purpose of getting from such persons money to which the defendants were not entitled." We submit that the indictment *does not allege this or show it.* Nor does it show that the acts were done for the purpose of getting money "by reason of not having rendered any service whatsoever." The court holds that *this* shows the *intent,* obviating the necessity of an allegation; and we earnestly urge this as manifest error. There is no contradiction of the law as set up in appellants' brief, page 7, lines 3 to 10, inclusive.

The special features of the demurrers of both defendants were not urged at the hearing of this matter,

as counsel were of the opinion that the general demurrers were good and sufficient. We desire here to call the particular attention of the court to these demurrers [Trans. pp. 15 and 19], the special features of which are in themselves an argument in their favor.

II.

**The Trial Court Erred in the Admission and Rejection of Certain Evidence.**

1. The first assignment of error, in the cross-examination of Dr. Fuller, was the refusal of the trial court to permit the witness to testify concerning the equipment, etc., of the office. The court here, after saying that the trial court has a wide range of discretion respecting cross-examination and "it is by no means apparent that the exercise of such discretion in thus curtailing the examination affected the defendants injuriously," further states that "the manner of equipment, etc., of the office had but little bearing, if any at all, on the subject," and thus dismisses the point. The defendants are charged with conspiracy to use the mails to defraud, and the very foundation of the Government's case is an intent to defraud. Certainly it cannot be said that if the witness had testified that the office had *no* equipment necessary to treat the diseases of men, it would not have a tremendous effect on the minds of the jury in determining the question of whether or not the defendants acted in good faith. Can it be said, therefore, that the converse is not true, and that the answer of the witness has "little bearing, if any at all, on the subject." The necessary implication,

from all the testimony in the case relative to the business and office of the defendants, is that Dr. Fuller was granted immunity from indictment by reason of his being a Government witness. In view of this, it was manifestly unfair to so limit his cross-examination that in order to bring out the sought-for facts it would be necessary for the defendants to make him their own witness. The attitude of the Government attorney, so clearly expressed in his own language in appellee's brief, page 13, lines 14 to 18, inclusive, to-wit: "It was the privilege of the prosecution, and exercised as such in this case, to limit the direct examination to certain matters only so that counsel for the defendants would be unable to substantially make Dr. Fuller their witness by their cross-examination of him," should be severely censured. It has always been recognized that it was the sworn duty of the Government attorney to bring all necessary facts before the court and jury to see that justice might be done; and not by subterfuge and by taking advantage of a technical point of evidence, to substantially prevent the defendant from bringing pertinent facts to the attention of the jury. The jury are entitled to all the facts, and if by its rulings the trial court assists the Government attorney in preventing pertinent facts from being brought before them, it is reversible error.

2. The second assignment of error was the admission in evidence over defendant's objections, of a certain alleged affidavit, marked Government's Exhibit No. 1A. This was objected to as being incompetent, irrelevant and immaterial; and second, that it was mere

hearsay as to one of the defendants. In the first place, there is nothing but the mere statement of an over-zealous counsel that this was an affidavit required to be made by the laws of the state of California, and it *does not show* that it had been filed with the State Board of Medical Examiners of the state of California on September 11, 1911. The attention of the court is called to the fact that the transcript, page 79, line 24, reads as follows: "of the state of California....., secretary." No signature of any secretary, or his deputy, or in fact of any person appears. Further, counsel for the Government proceeded upon the theory that this affidavit was made by one of the conspirators during the existence of the conspiracy, and for this reason urged its admission, and *upon this ground* the trial court admitted it. This was unquestionably error for it is a well founded and uncontroverted rule of evidence that a statement of one of the alleged conspirators cannot be admitted against another alleged conspirator until the Government has first proved a *prima facie* conspiracy. In this case there was no *prima facie* proof of a conspiracy at the time this affidavit was offered in evidence, the fact being *that at no time* during the trial of the cause was there *prima facie* case proven.

3. The next error assigned is the admission of two bound volumes of the Los Angeles Examiner. Again we find the court passing briefly over the objection in these words: "It is not at all apparent that their admission proved harmful to the defendants." No foundation at all was laid for the introduction of these ex-

hibits. No evidence was given to show that even any one connected with defendant's office wrote or dictated the writing and handled the publication of the advertisements spoken of. Most certainly the fundamental rule of evidence that a proper foundation must be laid for the introduction of documentary evidence has been violated, and can it be said that such violation, i. e., the admission of these large volumes of a well known newspaper, did not have any effect upon the minds of the jury? What would have been the effect if the volumes, upon being examined, had *failed to reveal* any advertisements of Dr. Freeman? Would not their admission have proved "harmful" to the Government?

4. Passing over for the moment the points in appellants' brief marked (e), (f), (g), (h) and (i) we come to what we consider one of the most vital errors in the case, to-wit: the rejection of the office correspondence of the defendant Freeman. Admission thereof was objected to on two grounds, first—because they were incompetent, irrelevant and immaterial; and second—because they were privileged communications and the privilege was not waived by the addressee or the writer of the letters. No direct ruling was made on either of these points, but the trial court refused to admit them on the ground that they were self-serving. The Appellate Court in its opinion merely stated that the letters were self-serving and not competent in the case. On the question of these being self-serving declarations and therefore not admissible, it is desired to call the atten-

tion of the court to Wigmore on Evidence (1904 Ed.), Vol. III, page 2231, where it is said:

> "(4) Statements after the act, stating the past intent or motive at the time of the act, are of course inadmissible under the present exception (statements by an accused person), though usable against the accused as admissions. But subsequent statements predicating a then existing state of mind are properly admissible under the present exception. No question is made about this when they are offered against the accused, because they are at any rate available as admissions. But they should be equally admissible in his favor. In both cases the object is to ascertain his subsequent state of mind, and thence to infer his state of mind at the time of the act. It is true that these declarations may not be thought to fulfill the requisite of the present exception that there should be no apparent motive to deceive; but this argument, as before, seems to involve the assumption of guilt."

And also on page 2273, Sec. 1765:

> "There is no principle of evidence especially excluding 'self-serving' statements by an accused person or by any one else. The hearsay rule excludes all extrajudicial assertions; and therefore the only inquiry need be whether such assertions are covered by some exception to that rule, or whether utterances amenable to it are evidential in any indirect way apart from their assertive value. There are one or two instances in which such a use of an accused's utterances partakes somewhat of the reasons for the present exception."

Dr. Freeman had testified, and such testimony was uncontroverted, that he followed up exactly the same

plan as to the mail and conduct of the mail matters in his office at Third and Broadway as he had done when he was in charge of the old office on Spring street. [Transcript, pages 112 and 113.] Both of the postoffice inspectors testified that it was not until 1914 that they called on Dr. Freeman and discussed with him the decoy letters, etc., and that he told them he knew nothing about the letters and that he had never seen them before. [Transcript testimony of C. E. Webster and C. S. Ranger.] This was the first time anything had ever been brought to his knowledge intimating that there was anything wrong with the conduct of the old or his new business. It is preposterous to say that his *bona fide* letters were written with a view to counteract any mail-fraud charges. This would be a presumption that this correspondence was false and fraudulent, knowingly so, and would negative the presumption that follows the defendant in a criminal case throughout all of the case, i. e., that he is *innocent*. And could even the overzealous Government attorney in the present case, by any stretch of his imagination, think that *all* of the doctor's *bona fide* patients would write letters like these at his direction and solely at his request and for such a purpose alone?

5. As to the objection that these were privileged communications, etc., this objection is groundless as shown by the Code of Civil Procedure of the state of California, Sec. 1881, Sub. 4, which is the rule followed by the federal court in the state, and which reads as follows: "A licensed physician or surgeon cannot, without the consent of his patient, be examined *in a civil*

*action* as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient," etc. This is the only time the question of privilege can be raised, and the court will note that this may be done ONLY IN A CIVIL ACTION. Finally as to the fact of the competency of the evidence in question. Counsel for the Government in his brief on page 24 says: "We desire to call this court's attention to the artful manner in which counsel for appellants endeavored to mislead the court below and the trial jury," etc. In our experience in the practice of law we have never seen or heard of any case where the prosecutor in a criminal case seemed so doggedly persistent and objected so strenuously and to such length to prevent all the facts and to keep the whole truth from reaching the jury. It is indeed unfortunate that a *verbatim* record of this case could not have been sent up on the appeal. And it is additionally unfortunate that the record does not show that the correspondence of the old office COULD NOT have been produced at the trial as it was not in existence, for such fact was brought out at the time. Putting aside this point, which would clearly admit these letters under the "best evidence" rule, we find the following to be the case. Here is a defendant in a criminal case charged with a violation of section 215, to-wit, a device or scheme to defraud by use of the mails. It is attempted to show by admittedly decoy letters that the defendant, with certain others, was engaged in a criminal conspiracy in the use of the United States mails. There is no more definite or certain way to tell whether or not a man is

engaged in a criminal conspiracy in the use of the mails than by the production of the correspondence which he actually had, NOT WITH FICTITIOUS PERSONS BY USE OF ADMITTEDLY DECOY LETTERS, but with his BONA FIDE patients, or, in other words, the PEOPLE WITH WHOM HE WAS ACTUALLY DEALING. The very foundation of the Government's case is an intention on the part of the defendants to defraud. An intention to deceive by use of the mails. Now how is the matter of intention determined? By decoy letters solely, which it is shown the defendant never saw before the postoffice inspectors showed them to him, or by FALSE STATEMENTS by the Government attorney that these letters were GENUINE and that the defendants had been guilty of defrauding people and persons, etc.? Or is it not true that there is nothing that would more clearly show the intention of the defendant than his actual correspondence with people with whom he was dealing? It is respectfully submitted that the record fails to disclose any evidence of the commission of, or attempt to commit, a crime except as disclosed and induced by the so-called decoy letters, and upon the theory that decoys are permissible to entrap criminals, but not to create them, and not to ensnare the law-abiding citizen into unconsciously offending, the petitioner here should have been discharged.

U. S. v. Healy, 202 Fed. 349;
Woo Wai v. U. S., 223 Fed. 412;
Sam Wick *et al.* v. U. S., 240 Fed. 60.

Every *bona fide* letter sent from the office of this defendant, where the mail business and the conduct of the mail matters was handled in exactly the same manner and under the same directions as in the office where this defendant was employed, stated to the patients to whom such letters were written that they MUST COME TO THE OFFICE for examination, which statements are in contravention of the things alleged in the indictment; and in view of this can it be said that such correspondence is not *competent* evidence in this case? Letters of Dr. Freeman to patients were what the whole case consisted of in theory. Admit these legitimate letters in evidence; let the jury pass on the question of their weight in determining the guilt or innocence of the accused; from the defendant's state of mind at the time he wrote them let the jury infer what his state of mind was at the times alleged in the indictment, and what is left of the Government's case? Merely advertisements in the Los Angeles Examiner. And what does the case then amount to? Merely a prosecution of a professional man for advertising. Is it any wonder that counsel for the Government objected to their admission, knowing full well that having had his "decoy letters" and their effect counteracted by the legitimate correspondence, his case could not stand on the mere advertisement alone? In this regard the particular attention of this court is called to the testimony of Postoffice Inspector C. E. Webster [Transcript, page 105, lines 26 to 30, inclusive], as follows:

"I saw *bona fide* letters written from that office, that is, letters that were not decoy letters, and I have them

in my files. I have one and possibly more. I got that one from the party to whom it was addressed."

Now this was from the Government's own witness, a man who had personally investigated and, to use his own language, "worked this case up." If the counsel for the Government was so anxious to lay all the facts before the jury and see that justice was done, why did he not have his star witness produce such letter or letters? We are forced to the conclusion that such letter or letters were either not in existence, or if they were, they were so favorable to the defense that the Government did not dare produce them. We urge most strongly upon this court that it was the most serious and grave error to deny the admission of the defendant Freeman's correspondence.

III.

## The Trial Court Erred in Giving and Refusing to Give Certain Instructions to the Jury

In instructing the jury of its own motion, the trial court said [in instructions 12 and 13—Transcript, page 201, lines 9 to 12 and 27 to 30, inclusive]:

"In other words, if the conspiracy existed, it does not matter what the government officers did in order to procure evidence to prove it. * * * You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is no defense in this action."

We most strongly urge that the giving of these parts of these two instructions was error of the gravest kind,

and their effect upon the minds of the jury was incalculable. While there is no doubt but IF THE CONSPIRACY EXISTED, the conduct of the officers in securing evidence to prove it was of little moment. BUT THE EXISTENCE OF SUCH CONSPIRACY WAS A MATTER FOR THE JURY ALONE TO DETERMINE, and if they should decide that IT DID NOT EXIST, what then of the decoy letters and the replies thereto? They most certainly would be a defense and a complete one at that. We deem it unnecessary at this time to quote authorities upon such a plain, well-known statement of law. In its opinion the Appellate Court states that the conspiracy MUST HAVE EXISTED INDEPENDENTLY of the decoy letters and in almost the same breath holds that such letters and the replies thereto must be taken as evidentiary of the fact of the conspiracy. We submit that such letters and replies are not evidentiary, but that they are to be considered, if anything, as mere overt acts. And until the conspiracy was proven, or at least until a *prima facie* case presented, they could not, and should not, have even been admitted in evidence. We submit that the trial court overstepped its authority when it instructed the jury, even though by inference, that the conspiracy had been proven to exist independently of such letters; and for these reasons urge that the instructions, more especially No. 13, were erroneous.

We respectfully ask this court, in order that a miscarriage of justice shall not be made permanent, to grant a rehearing to the defendant Freeman, to enable

him to elaborate upon the errors above cited, and to quote ample points and authorities sustaining each and every one of the same.

Respectfully submitted,

M. E. MEADER,

*Attorney for Gideon M. Freeman, Plaintiff in Error.*

C. W. PENDLETON,

*Of Counsel.*

State of California, County of Los Angeles—ss.

I, M. E. Meader, do hereby certify that I am now, and at all stages of the proceedings in this court have been, an attorney and counsel for Gideon M. Freeman, one of the plaintiffs in error in the within entitled action, and in my judgment the foregoing petition is well founded, and is not interposed for the purpose of delay.

M. E. MEADER.